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CASE NO.

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IN THE SUPREME COURT OF THE UNITED STATES

BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,
Petitioners,

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED

I. Does the First Amendment require courts to analyze the intended or received meaning of an alleged defamatory statement and whether the statement contains a factual connotation capable of being proven true or false before concluding that a statement is nonactionable as rhetorical hyperbole?

II. May a court of appeals grant more protection in public figure libel cases than required by the First Amendment where, in doing so, it is in conflict with decisions of a state court of last resort?

III. May the standards established by this Court in *Linn v. Plant Guard Workers* to effectuate a uniform national labor policy for defamation during a labor dispute be overridden by states imposing a pecuniary or other special damage requirement in addition to actual malice and actual injury to reputation?

PARTIES TO THE PROCEEDING

Appellants in the court below and Petitioners herein are Beverly Enterprises, Inc. ("Beverly") and Donald L. Dotson, Beverly's Senior Vice President of Labor & Employment. Beverly has no parent corporation nor does it have any non-wholly owned subsidiaries.

Appellees in the court below and Respondents herein are Service Employees International Union (the "SEIU") Local 585, a labor organization, and its President, Rosemary Trump.

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Restatement (Second) of Torts, §573, comments, b, c and e (1977) 5,7

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Petitioners Beverly Enterprises, Inc. and Donald L. Dotson ("Petitioners") respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals, dated July 8, 1999, is officially reported at 182 F.3d 183 and is reproduced in the Appendix ("A") at A2. The Third Circuit's Order dated July 30, 1999, denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced at A22. The decision of the U.S. District Court for the Western District of

Pennsylvania, dated March 5, 1998, is officially reported at 1 F. Supp.2d 489, and is reproduced at A13.

JURISDICTION

The Judgment and Opinion of the Third Circuit Court of Appeals was entered and filed on June 28, 1999 and modified, for punctuation only, on July 8, 1999. On July 12, 1999, Petitioners timely filed a Petition for Rehearing and Suggestion of Rehearing En Banc, which was denied by Order filed July 30, 1999. This Petition for Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is vested under 28 U.S.C.S. Section 1254(1) (Law. Co-op. 1988 & Supp. 1999).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED [Included in Appendix]

First Amendment to the U.S. Constitution

29 U.S.C. §151

29 U.S.C. §158(c)

18 U.S.C. §§207, 208 and 216

STATEMENT OF THE CASE

Introduction. This diversity-based defamation action arises from statements made by Respondent Rosemary Trump about Petitioner Donald Dotson during two separate incidents, one at a political rally and another at a televised "Town Hall meeting." The statements were made during the course of what the Third Circuit Court of Appeals described as "a long standing and acrimonious

relationship between Beverly Enterprises, a national provider of nursing home care, and the Service Employees International Union ("SEIU"), whose local affiliates represent a substantial number of Beverly's employees." (A3-4) .

Petitioner Donald L. Dotson is Beverly's Senior Vice President for Labor and Employment since 1992 and prior to that, the Court of Appeals acknowledged, "had a prestigious career in labor relations, serving as Chairman of the National Labor Relations Board and as Assistant Secretary for Labor-Management Relations at the U.S. Department of Labor." (A4). Respondent Rosemary Trump was President of Local 585 of the SEIU.

There are three defamatory statements at issue. Petitioners contend each was incorrectly decided by the Court of Appeals to be not actionable. One is the statement that Dotson had "devot[ed] [his] entire career to busting unions." A second statement accused him of being "part of that World War II generation that danced on the graves of Jews." A third accused him of seeking employment with Beverly to represent the company on matters on which he had acted in his official capacity as Chairman of the National Labor Relations Board and on which he had obtained or had access to confidential information during his tenure as a public official.

As Dotson is a public figure and the defamation occurred during a labor dispute, Dotson alleged that Trump acted with actual malice in making these statements and that his reputation had been injured. Dotson did not allege that he had suffered any special, out-of-pocket damages. Petitioner Beverly sued Trump only on the third statement at issue and both sued Trump in her individual capacity only. A second suit was filed against SEIU Local 585 over the third statement after Local 585 declined to repudiate Trump's comments or indicate that the statements had not been made in her official

capacity as President of the Local 585. It was consolidated with the case against Trump. (A21). A discussion of the three defamatory statements follows.

"Dotson Devot[ed] [His] Entire Career To Busting Unions." Trump confronted Dotson in August, 1996 at a political rally in Pittsburgh for the Dole/Kemp presidential campaign. She approached Dotson in the middle of a large crowd and, when Dotson admitted he did not know who she was, became visibly upset, told Dotson he should know who she was. She then identified herself and began to berate Dotson in a loud and angry voice, including accusing him of "devoting [his] entire career to busting unions." (A4).

Relying on *Old Dominion Branch No. 496 National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 268 (1974), the District Court held the statement to be incapable of a defamatory meaning, finding it to be "mere hyperbole and insulting rhetoric that are unfortunately commonplace in labor disputes." (A15-16). The Court of Appeals affirmed, citing *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970). Neither the District Court nor the Court of Appeals analyzed the meaning of the statement and whether it was capable of being proven true or false.

"You're Just Part Of That World War II Generation That Danced On The Graves Of Jews." After the preceding statement, the Court of Appeals noted that "despite Dotson's efforts at reasoned discourse, Trump continued berating Dotson, finally shouting at him: 'I know your kind. You're just part of that World War II generation that danced on the graves of Jews.'" (A4).

The District Court held that the statement was also rhetorical hyperbole which no person would have taken literally and hence was incapable of defamatory meaning. (A16). The Court of Appeals did

not agree and held that the statement was capable of a defamatory meaning. (A7). Nevertheless, the Court of Appeals affirmed the lower court's dismissal, finding that the statement was not *per se* defamatory. As Dotson had not pled special, pecuniary damages, it upheld the dismissal on those separate grounds, i.e., *per quod* slander in Pennsylvania requires the pleading of pecuniary or other special damages in addition to pleading actual harm to reputation.

In holding the statement was not defamatory *per se*, the Court of Appeals failed to address the question of whether taking public delight in the slaughter of Jews during the Holocaust and enthusiastically endorsing mass murder, imputed to Dotson characteristics or views incompatible with his position as a lawyer or as a former high public official, something which is uniformly considered defamation *per se*. *See* Restatement (Second) of Torts, §569, comment e; §573, comments b, c and e (1977).

"Don Dotson Knocked On . . . The Beverly Door And Said, Who Knows More About All Of Your Unfair Labor Practice Cases Than Me, Since I Have Been Supervising Them on Behalf of the Government?" In May, 1997, the SEIU and Trump organized a "Town Hall meeting," persuading several Democratic members of Congress to gather that day purportedly to hear unsworn statements concerning a pending bill. Petitioners' Complaint alleged that the true purpose of the "Town Hall meeting" was to provide an attention-getting forum to attack Beverly and assist the SEIU in its corporate campaign against Beverly during a time of collective bargaining negotiations between Beverly and the SEIU in Pennsylvania. (A48).

The meeting was broadcast on local cable television (A51). Trump was asked a question by one of the Congressmen: "Just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly

locations across the country? What transpired in Pennsylvania to make the situation here much worse?"

During her answer, Trump made the following statement: "But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government . . . ." (A37-38).

The District Court refused to rule on whether this statement was defamatory, holding that Trump had absolute testimonial immunity. The Court of Appeals declined to consider the District Court's finding of absolute testimonial immunity. Instead, though not briefed by the parties on appeal, the Court held that the statement was not defamatory *per se* because it did not accuse Dotson or Beverly of engaging in criminal conduct. As neither Dotson nor Beverly had claimed special damages, the Court of Appeals dismissed the case on the same basis as the defamatory statement about Dotson "dancing on the graves of Jews," i.e., slander *per quod* in Pennsylvania required pecuniary or other special damages *in addition to* actual damage to reputation.

As with the comment about dancing on the graves of Jews, the Court of Appeals did not consider whether an accusation that a lawyer sought private employment in representing a client on matters in which he had acted in a quasi-judicial capacity or in which he had substantial responsibility as a public employee reflected so adversely on his trade or occupation so as to constitute *per se* defamation. Likewise, the Court did not analyze whether a lawyer seeking private employment based upon his knowledge of confidential information

which he acquired or might have acquired while a government employee reflected adversely on his trade or occupation so as to constitute *per se* defamation. Such false statements which adversely reflect on an attorney's practice or a public official's position constitute defamation *per se*. *See* Restatement (Second) of Torts, §569, comment e; §573, comments b, c and e (1977).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

I. THE THIRD CIRCUIT'S FINDING OF RHETORICAL HYPERBOLE WITHOUT CONDUCTING AN ANALYSIS OF WHETHER THE STATEMENT CONTAINED A FACTUAL CONNOTATION CAPABLE OF BEING PROVEN TRUE OR FALSE WAS IMPROPER AND CONTRARY TO SUPREME COURT CONSTITUTIONAL DEFAMATION DOCTRINE

This case raises the question of whether there is a short cut for finding rhetorical hyperbole to be constitutionally privileged, i.e., incapable of a defamatory meaning. Are dismissive conclusions, accompanied by a label, or based on a category, constitutionally sufficient? The Third Circuit thinks so and, unfortunately, so do many other circuits, in clear violation of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and its predecessors.

A. The Statement that a Former National Labor Relations Board Chairman and Assistant U.S. Secretary of Labor "Had Devoted His Entire Career to Union Busting" Contains a Factual Connotation Capable of Being Proven True or False

Petitioners contend that *Milkovich* and the decisions of this Court preceding it regarding the constitutional protection afforded rhetorical hyperbole, *Greenbelt*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) and *Austin* make clear that courts cannot afford constitutional protection to potentially defamatory statements simply by applying a label of rhetorical hyperbole and failing to analyze the intended or received meaning of the words and whether they contain a factual connotation capable of being proven true or false.

Under this Court's precedents, particular words or categories of words should not automatically be afforded constitutional protection as rhetorical hyperbole when the words have both a literal and a figurative meaning *and* the meaning intended or received is literal.

Judge Posner correctly explained this principle in his decision in *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996):

> Among the terms or epithets that have been held . . . to be incapable of defaming because they are mere hyperbole rather than falsifiable assertions of discreditable fact are "scab," "traitor," "amoral," "scam," "fake," "phony," "a snake-oil job," "he's dealing with half a deck," and "lazy, stupid, crap-shooting, chicken-stealing idiot." It is apparent from the list that the defamatory capability of these terms cannot be determined without consideration

> of context. *See Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1542, 26 L.Ed.2d 6 (1970) ("blackmail"); *McCabe v. Rattiner*, 814 F.2d 839 (1st Cir. 1987) ("scam"). Each of the terms has both a literal and a figurative meaning and whether it is capable of being defamatory depends on which meaning is intended, a question that can be answered only by considering the context in which the term appears. "Scab," for example, means literally one who is hired to replace a striking worker, but it is also used figuratively, to denote a worker who is not a union supporter. If as in *National Association of Letter Carriers v. Austin, supra*, a person is called a "scab" in a union newsletter because he refuses to join a union, this is not defamation but merely an expression of hostility; the word is obviously being used in its figurative sense. But if a union leader were accused of having been a scab in his youth, this could well be understood to be a literal use of the word and therefore an assertion that he had engaged in conduct that demonstrated his unfitness to be a union leader. And so with "traitor," another word held non-defamatory in *National Association of Letter Carriers v. Austin*. The use of the word in the context of that case was plainly figurative rather than literal, but the word was being used in its literal sense when Whittaker Chambers called Alger Hiss a traitor. Another example would be calling a person a "lunatic."

Dilworth, 75 F.3d at 310.

Judge Posner correctly interpreted and harmonized all of this Court's teachings on rhetorical hyperbole from *Greenbelt* through *Austin* to *Milkovich* in a way that the Third Circuit did not appreciate nor apply in the instant case. While there was a labor dispute between the respective employers of Dotson and Trump, this was not a picket line epithet hurled at Dotson by a striking worker. It was a large public gathering, a presidential campaign rally without any connection to the Beverly-SEIU dispute. Moreover, the words Trump used in front of this large crowd were quite specific and contained a literal meaning which is capable of being proven true or false, i.e., that Dotson had "devoted [his] entire career to busting unions." "[E]ntire career" obviously included Dotson's tenure at the National Labor Relations Board and at the U.S. Department of Labor where he was sworn to uphold the statutory rights of all appearing before the agency, including labor unions. Unlike "blackmail" in *Greenbelt* or "scab" or "traitor" in *Austin*, there is a literal meaning included within the Trump statement which, under *Milkovich*, contains a factual connotation capable of being proven true or false.[1]

What Trump said about Dotson is no different and no less defamatory than accusing the Chairman of the Equal Employment Opportunity Commission of having devoted his career to discriminating against persons on the basis of race or accusing the Chairman of the National Conference of Christians and Jews of having spent his entire life engaging in anti-Semitic conduct. The list could go on, but the factual connotation in each of these situations is clear: There is specific conduct being ascribed to a person which is completely inconsistent and incompatible with the duties of the position he held. A *Milkovich* analysis would have made this obvious.

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[1]The *Random House Unabridged Dictionary* 2072-2073 (2d ed. 1993) definition of "union buster" includes: " 2. Any person . . . that tries to destroy or weaken a union, as through prosecution or intimidation."

There is absolutely no recognition in the Third Circuit's opinion that this type of analysis is constitutionally required — what the meaning was; whether the meaning intended was figurative or literal; and, if literal, whether it contained a factual connotation capable of being proven true or false. Both the District Court and the Court of Appeals saw the term "busting unions" and did no more. Both courts automatically assumed the meaning intended was figurative, while ignoring the key phrase which made it literal, i.e., "devoted [his] entire career." This is precisely the point Judge Posner made in *Dilworth*:

> If you say simply that a person is a "rat," you are not saying something definite enough to allow a jury to determine whether what you were saying is true or false. If you say he is a rat because. . . whether you are defaming him depends upon what you say in the because clause.

Dilworth, 75 F.3d at 309.

Had it stood alone — like "scab," "traitor," "blackmail" or "scam" — "busting unions" may have been sufficiently indefinite to sanction the views of the court below. But Trump also added what Posner calls a "because" clause, saying Dotson has "devoted [his] entire career" to union busting, i.e., he is not just a union buster today because he works for Beverly but he has always been one even when he held high public offices where he was legally obligated to protect the rights of labor unions.

Unfortunately, the Third Circuit's truncated approach in this case is not an aberration among the circuits. Other circuits also use categories or labels as a substitute for the required analysis of

meaning and whether the meaning intended or received is figurative or literal.

B. The Circuits' Inconsistent Application of *Milkovich* and *Masson* Has Failed to Give Effect to This Court's Mandate to Emphasize Meaning Over Categories and Labels in Defamation Analysis

This Court's decisions in *Milkovich* and *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) build upon the Court's earlier decisions in *Greenbelt*, *Austin* and *Falwell*, and emphasize the role of meaning in defamation analysis, in contrast to previous decisions of this Court which had emphasized labels and categorization over meaning.[2] The circuits' response to *Milkovich* and *Masson* has been confusing, inconsistent and inappropriate. If not clarified quickly, the circuits will continue to thumb their noses at those decisions, sabotaging their mandate of a meaning-based analysis of defamation.

Milkovich denounces the "categories" approach to defamation law. It rejects any approach to defamation analysis which focuses on genre or labels. *Milkovich* instead protects unprovable statements, i.e., statements that do not contain a factual connotation capable of being proven true or false. The dispositive question in *Milkovich* was what was the author's point — did he mean to say that Milkovich committed perjury? *Masson* held that altered quotes were actionable only if they resulted in a material change in the *meaning* conveyed by the statement. Thus, in both cases, this Court adopted

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[2]For instance, the actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964) protects speech regardless of meaning. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which emphasize fault, the status of the plaintiff and whether the statements at issue are of public or private concern, without regard to meaning.

a test that was explicitly based on the meaning of the statement at issue.

The *Milkovich* and *Masson* tests are consistent with the pragmatic paradigm of meaning. In *A Pragmatic Approach to Meaning in Defamation Law*, 34 Wake Forest L.R. 333 (1999), Prof. Jeffrey Thomas argues that this focus on meaning in defamation law is just as it should be. Prof. Thomas points out that the tests set forth in *Milkovich* and *Masson* emphasize the gist of the statements, not their precise literal meanings, and that analysis of gist requires consideration of both the point which the author intended to convey as well as what the recipient understood the author's point to be. 34 Wake Forest L.R. at 397. Only then can a court determine whether the statement at issue contains a factual connotation capable of being proven true or false.

The Third Circuit in this case is only one example of the federal circuit courts' continued fascination with genre and label, and failure to properly analyze a statement's meaning. Judge Posner, in *Dilworth*, *supra*, is the exception, rather than the rule.

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122 (1st Cir. 1997) is in marked contrast to *Dilworth*. At issue were two statements: First, that the plaintiff's store was "trashy" and, second, that when you call plaintiff's store, "you are sometimes put on hold for 20 minutes — or the phone is never picked up at all." The First Circuit took two different analytical approaches to determine whether these statements were capable of a defamatory meaning.

With regard to the "trashy" statement, the court of appeals concluded that the term did not imply provably false facts. Observing that the word evoked a multiplicity of meanings, the First Circuit concluded that the more meanings a term can reasonably convey, the

less likely it can be actionable. The intended or received meaning of the term in the context of the case played no role in the court's analysis.

The court's conclusion with regard to the "on hold for 20 minutes" statement was that it was sufficiently factual to be proven true or false because it could be regarded as stating actual facts about the store. *Levinsky's, Inc.*, at 131. Although the court did not attempt to determine the point intended to be conveyed by the speaker, it did, at least superficially, examine what the recipient of the statement would have understood the point to be and concluded that the overall context did not dispel the impression that actual facts were being stated.

The approach of the Eighth Circuit in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union Local 655*, 39 F.3d 191 (8th Cir. 1994) is typical of the flawed approach of many courts since *Milkovich*. Although the court cites *Milkovich*, as well as *Austin* and *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966) for the proposition that statements are actionable only if they reasonably imply false and defamatory facts, there is no initial analysis of the meaning of the statements at issue. Instead, as did the Third Circuit in this case, the Eighth Circuit analyzed context only so that it could label the statement at issue as one which occurred during an ongoing labor dispute. There was no subsequent analysis of how the labor dispute context may have affected the recipient's understanding of the author's point.[3]

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[3]Context should be used to discern meaning and not, as in many of these cases, to categorize or label terms. "Most courts simply read the statement and determine whether the context will support the meaning at issue. The approach of the pragmatic paradigm, however, focuses the inquiry on the recipient's interpretation of the *speaker's* meaning." Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 Wake Forest L.R. at 356 (footnotes omitted).

In *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997), the Ninth Circuit has come the closest to Judge Posner in properly analyzing meaning under *Milkovich*. The court did not cite *Milkovich* in analyzing the defamatory meaning of a picket sign which said, "This medical facility is full of rats," but the court properly examined both the statement's intended and received meaning and held that it was capable of being construed literally as the hospital having a rodent problem even though the union claimed that the term "rat" had deep historical meaning in the context of labor disputes to figuratively mean an employer who fails to pay prevailing wages.

In another Ninth Circuit case, however, *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), the court cited *Milkovich*, but gave only lip service to an analysis of meaning and really used *Milkovich* (improperly) to justify a categorical approach to defamation. In that case, the allegedly defamatory statement was calling the head of the local firefighters' union a "Jimmy Hoffa." The court applied a 3-part test which analyzed context but not what meaning the author intended, or what the recipients of the message may have understood, i.e., that plaintiff was being compared to a convicted felon who had close ties with and was eventually killed by organized crime elements. Thus, context was used to arrive at the label of rhetorical hyperbole without an analysis of meaning. *See also Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995), where the same test was also applied to determine that the statement, "If I defend you the way [plaintiff] is defending Walker, you'll spend the rest of your life in prison," was non-actionable rhetorical hyperbole and imaginative expression.

The D.C. Circuit has also grappled unsuccessfully with the concept of defamatory meaning under *Milkovich*. In *Moldea v. New York Times Co.* (*Moldea II*), 22 F.3d 310 (D.C. Cir.), *cert. denied*,

513 U.S. 875 (1994) the panel reversed its own decision from three months earlier (15 F.3d 1137) that a book reviewer's criticism that plaintiff's book was marred by "too much sloppy journalism" was actionable because it was verifiable. In *Moldea II*, Judge Edwards concluded that the panel's earlier decision had failed to take sufficient account of context, i.e., that the statements at issue appeared in a book review, "a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations." *Moldea II*, 22 F.3d at 311. *Moldea II* noted that context was especially important in hyperbole cases, "because it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea II*, 22 F.3d at 314.

This sounds like the Court properly used context to analyze the recipient's understanding of the author's point. The court's analysis of context, however, was used not to determine meaning, but to categorize book reviews as a distinct genre and apply a different set of rules to that genre. For book reviews and other journals of commentary or criticism, *Moldea II* adopts the "supportable interpretation" test, i.e., whether the critic's interpretation is supported by the actual text. Although the Supreme Court's decision in *Masson* is cited as supporting this test, it is a test with no real reference to meaning.[4]

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[4]Other examples of circuit court decisions which purportedly apply *Milkovich* without first analyzing the meaning of the words at issue include *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 186 (4th Cir. 1998) (critical statements in a "stock-tip" column held non-actionable "based on the tenor, language and context of the article, . . . "); and *Hayhurst v. Beyrle*, No. 95-3335, 1996 U.S. App. LEXIS 15404 (10th Cir. June 25, 1996) (letter from the defendant doctor indicating that he could not support a colleague who uses certain therapies, because the colleague is not a good representative of the profession, is non-actionable).

The circuit courts have had almost ten years to figure out *Milkovich*, and they still consistently get it wrong. Much defamation analysis looks no different than it did prior to *Milkovich*, with labels and categories determining outcome, rather than meaning and factual verifiability. It is clear that the circuit courts will not find their way on their own, but must be led further by this Court.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE PENNSYLVANIA SUPREME COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE PROTECTIONS AVAILABLE TO DEFENDANTS UNDER THE FIRST AMENDMENT IN PUBLIC FIGURE DEFAMATION ACTIONS

This case calls into question the propriety of a federal appellate court decision providing more protection to defendants in public figure libel cases than does the First Amendment, and doing so in direct conflict with the Pennsylvania Supreme Court.

A. The Third Circuit's Decision Imposes an Additional Burden on Public Figure Libel Plaintiffs in Pennsylvania to Prove Pecuniary or Other Special Damages in Addition to Actual Harm and Actual Malice

Under this Court's Decisions, Public Figures Need Only Plead Actual Malice and Actual Harm to Reputation to State a Claim for Relief

Beginning with *New York Times, Co. v. Sullivan*, this Court has carefully struck the balance between the First Amendment guarantees of free speech and free press, and the rights of individual citizens to protect their good names and standing in the community. Major aspects of the common law of defamation have now been

constitutionalized, including what proof is required for the recovery of presumed and actual damages to reputation.

This Court first addressed the constitutional implications of defamation damages in *Gertz v. Robert Welch, Inc.* *Gertz* held that defamation could no longer be a strict liability tort and that the recovery of presumed damages without a showing of fault, even in cases of defamation *per se*, improperly infringed upon First Amendment freedoms. Thus, the Court in *Gertz*, consistent with its previous holding in *Linn*, held that there can be no liability for defamation without a showing of some level of fault by the publisher. *Gertz*, however, held that the First Amendment *does permit* recovery of presumed damages in cases where the *New York Times* standard of actual malice has been proven.

This is a public figure defamation case. Petitioner Dotson acknowledges that he is a public figure and must prove actual malice to prevail in this action. Petitioners' Complaint clearly meets the standards of *Linn* and *Gertz* by alleging that the three defamatory statements at issue were published by Trump with actual malice, and have resulted in actual harm to Petitioners' reputations and standing in the community.

The Third Circuit's Decision Improperly Expands the Protections Available to Defendants in Public Figure Defamation Cases in Pennsylvania

The Third Circuit Court of Appeals affirmed the dismissal of Petitioners' claims based upon Trump's "dancing of the graves of Jews" and "Town Hall" meeting statements because it concluded that those statements were not defamatory *per se*, and Petitioner had failed to allege special damages. Thus, despite the fact that *Gertz* explicitly held that presumed damages were recoverable when actual

malice was proven, and despite the fact that Petitioners went beyond mere reliance on presumed damages and alleged actual damages to their reputations, the Third Circuit added the extra hurdle of pleading and proving special damages. In doing so, the court of appeals relied upon a number of Pennsylvania cases, all decided before *Gertz*, which held that plaintiffs in slander cases which are not *per se* must allege special damages, including *Baird v. Dun & Bradstreet, Inc.*, 285 A.2d 166 (Pa. 1971); *Solosko v. Paxton,* 119 A.2d 230 (Pa. 1956); and *Altoona Clay Prod. Inc. v. Dun & Bradstreet, Inc.*, 246 F. Supp. 419 (W.D. Pa. 1965), *rev'd on other grounds*, 367 F.2d 625 (3d Cir. 1966).

Since, in the court's opinion, the "dancing on the graves of Jews" and the "Town Hall" meeting statements did not constitute an accusation of criminal wrongdoing, they were not slander *per se*, and Petitioners' claims based upon these statements were dismissed for failure to allege special damages. (A12).[5] By adding the special damages hurdle in *per quod* cases, the Third Circuit has clearly expanded the protections afforded defendants under the First Amendment by this Court in public figure defamation cases. Such expansion is directly contrary to Pennsylvania law as set forth by the state's highest court.

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[5]The Third Circuit did not even consider whether Trump's "Town Hall" meeting statements could reasonably have been interpreted as imputing unethical business misconduct which would also render them slanderous *per se*. This was inexcusable, especially in light of the appeals court's recognition that Trump's "statement undeniably implies that Dotson sought to capitalize on his knowledge of the NLRB's prosecutions of Beverly in an effort to obtain employment with Beverly," and that "Dotson successfully secured his job at Beverly on the basis of his knowledge of their ongoing litigation with the NLRB." (A11).

The Third Circuit's Decision Conflicts with a Decision of Pennsylvania's Highest Court Which Strictly Limits the Protections Available to Defendants in Public Figure Libel Cases to Those Provided by the First Amendment

The Pennsylvania Supreme Court has explicitly held that Pennsylvania's constitution will not allow any greater protection for speech than is mandated by this Court under the First Amendment. This is because Article I, section 1 of the Pennsylvania Constitution provides:

> Inherent Rights of Mankind
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, *possessing and protecting property and* ***reputation***, and of pursuing their own happiness. (emphasis added.)

In *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988), Pennsylvania's court of last resort held that Pennsylvania courts may go no further than this Court's dictates in protecting First Amendment principles, lest they violate Pennsylvania's unique constitutional protection of its citizens' reputations:

> It is clear that the Supreme Court has set forth the parameters necessary to satisfy the dictates of the First Amendment. Any further action on our part could run afoul of our state constitution. Under Article I, section 1 of the Constitution of this Commonwealth, a person's interest in his or her reputa-

> tion has been placed in the same category with life, liberty and property.

Sprague, 543 A.2d at 1084 (citations omitted).[6]

Thus, the Third Circuit's decision, which expands the protections afforded defendants under the First Amendment by the decisions of this Court, is in conflict with the Pennsylvania Supreme Court which has made clear that the Pennsylvania Constitution does not permit an expansion of protections beyond those provided by the First Amendment in public figure defamation cases.

B. The Third Circuit's Decision Conflicts with Decisions of Pennsylvania's Supreme Court Which Make Clear That Trump's Statements At The Publicly Televised "Town Hall" Meeting Are Libel, Not Slander, Thus Negating Any Requirement of Special Damages

Television broadcasts are libel, not slander. As alleged in Petitioners' Complaint, the "Town Hall" meeting where Trump made her statement about Dotson "knocking on the door of Beverly" was broadcast on cable television. (A51; *see also* Affidavit of Rosemary Trump, A55). Thus, there can be no dispute that Petitioners' claim regarding that statement is for libel, not slander.

According to the Restatement (Second) of Torts §568A (1977), "Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript."

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[6]Only the constitutions of Arkansas, Delaware, North Dakota and Pennsylvania specifically list reputation as an inalienable right on a level with life, liberty and property.

> The wide dissemination that results from broadcasting over radio and television, together with the prestige and potential effect upon the public mind of a standardized means of publication that many people tend automatically to accept as conveying truth, are such as to put the broadcaster upon the same footing as the publisher of a newspaper.

Id., at comment a.

The Pennsylvania Supreme Court has treated defamation actions arising from radio and television broadcasts as libel, not slander. *Purcell v. Westinghouse Broadcasting Co.*, 191 A.2d 662 (Pa.1963); *Schonek v. WJAC*, Inc., 258 A.2d 504 (Pa.1969); and *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa.1987). As noted by Professor Smolla in his treatise, this is clearly the more reasonable position:

> The wide dissemination that results from such a broadcast, and the power and impact of the electronic media in contemporary American life, makes this position the most logical in light of the policy underlying the libel/slander distinction, which is to treat as libel those communications more likely to be seriously harmful.

Rodney A. Smolla, *The Law of Defamation* §1.04[4], at 1-11 (1998).

The court of appeals analyzed Trump's "Town Hall" meeting statements under the rules it believed applied to slander in Pennsylvania, not libel. As a result, the court affirmed the district court's dismissal of Petitioners' claims based on those statements because, under its interpretation of Pennsylvania law, slander cases which are

not *per se* require the pleading and proof of pecuniary or other special damages, even in the presence of actual malice and actual harm to reputation. *Agriss v. Roadway Express, Inc.*, 483 A.2d 456 (Pa.1984) (one of the cases relied upon by the Third Circuit) makes clear, however, that, at least in libel cases, Pennsylvania has eliminated the distinctions between *per se* and *per quod* and, thus, eliminated the requirement of special damages in favor of the *Linn* and *Gertz* requirements of actual harm to reputation and actual fault by the publisher.

By ignoring the Pennsylvania Supreme Court decision that the state constitution prohibits protection for libel defendants beyond those provided by the First Amendment, and by failing to classify Trump's televised statements as libel, not slander, the Third Circuit is in direct conflict with Pennsylvania's court of last resort on an important federal question, i.e., the protections to be afforded defendants under the First Amendment in public figure libel cases. Hence, at a minimum, this Court should grant Petitioners' Writ of Certiorari, vacate the decision and remand to the Third Circuit for reconsideration in light of the Pennsylvania Supreme Court cases with which its decision is in conflict.

III. THE THIRD CIRCUIT'S RELIANCE ON STATE LAW PLEADING DISTINCTIONS OF DEFAMATION *PER SE* AND *PER QUOD* TO IMPOSE A PECUNIARY OR OTHER SPECIAL DAMAGE REQUIREMENT IN ADDITION TO ACTUAL MALICE AND ACTUAL INJURY TO REPUTATION WAS IMPROPER AND CONTRARY TO SUPREME COURT DOCTRINE ON LABOR DISPUTE DEFAMATION

This case calls into question the validity, in the context of labor dispute defamation, of what one commentator has called the "bizarre twists and turns over the last two centuries" of arcane state law distinctions between defamation *per se* and *per quod* and the requirement of special, pecuniary damages in the latter.[7]

A. The Standard Established by this Court to Effect a Uniform National Labor Policy for Defamation During Labor Disputes Has Been Improperly Altered by the Third Circuit's Ruling

To what extent may states vary the uniform national standard set by this Court in *Linn* covering defamatory statements published

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[7] Smolla, *The Law of Defamation* §7.1 "Overview of Special Harm," at 7-2). Prof. Smolla goes on to state:

> The common law special harm rules were illogical enough when they were originally created. When the many historical variations and complicated first amendment rules that now must be superimposed upon them are added in, the result is a quagmire of archaic, arbitrary, internally inconsistent rules. The chaos that now exists under this regime does neither plaintiffs nor defendants any long term good.

Id. §7.08 at 7-18. Chaos based on "archaic, arbitrary, internally inconsistent" state common law is an anathema to a uniform, national labor policy.

during the course of a labor dispute? Specifically, to what extent may the states impose additional burdens on plaintiffs defamed during a labor dispute beyond those set by this Court? Petitioners submit that, if there is indeed to be a uniform national standard, the only appropriate answer is "not at all." This Court has already balanced the competing federal and state interests in this type of case and set the standard — a standard ignored by the Third Circuit.

One of Congress' primary purposes in passing the National Labor Relations Act (the "NLRA") was to establish a uniform national labor policy. And, on scores of occasions, this Court has been called upon to determine the extent to which the federal interest in establishing and maintaining a uniform national labor policy outweighs state interests which either directly or indirectly impinge upon that national policy. Forty years ago, this Court set forth in detail the analysis that should be applied to determine the "extent to which the variegated laws of the several states are displaced by a single, uniform, national rule . . . " *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241 (1959).

In *Garmon*, this Court stated that state law must be overridden if it impermissibly infringed upon a uniform national labor policy regardless of whether the conflicting state law is one specifically directed toward labor relations or is one of "broad general application." *See Garmon*, 359 U.S. at 244. Moreover, it does not matter whether the potential conflict concerned substantive "rules of law, [or] of remedy . . . ."

In *Linn*, this Court set *both* the standard to be met on the substantive rule of law *and* the remedy available to a plaintiff who has been defamed during the course of a labor dispute. Specifically, a party who has been defamed during the course of a labor dispute must prove that the defamatory statements were published with

"actual malice" *and* that the defamatory statements caused actual damage. This Court, in establishing this uniform national standard for libels growing out of labor disputes, held that the "known lie" has no more place in a labor dispute than it does in the political arena. *Linn*, 383 U.S. at 67. Moreover, in determining the appropriateness of establishing a uniform national standard, the Court stated:

> After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

Linn, 383 U.S. at 63.

There can be no doubt that Beverly and Dotson met the *Linn* standard in the instant case. Indeed, the Third Circuit acknowledged as much — the complaint alleges that false and defamatory statements were published with actual malice and that actual damages then resulted. (A4). While the Third Circuit held that some statements were protected as rhetorical hyperbole, it also held (unlike the District Court) that accusing Dotson of being "part of that World War II generation that danced on the graves of Jews" imputed criminal conduct and bigotry to Dotson and hence was capable of a defamatory meaning. (A7). Likewise, the Third Circuit found that the accusation that Dotson sought employment with Beverly to represent it on matters on which he had acted in his official capacity as Chairman of the National Labor Relations Board might be susceptible of a defamatory meaning. (A12).

The Third Circuit nevertheless held that Dotson could not maintain his defamation suit against Trump and the SEIU despite having met the *Linn* standard of pleading. In reaching its decision,

the Third Circuit held that, under Pennsylvania law, in addition to meeting the *Linn* requirements, a plaintiff defamed during the course of a labor dispute must also plead and prove an additional element — pecuniary or other special damages in addition to reputational harm — where the defamation was not slander *per se*. The Third Circuit's decision thus has the unmistakable effect of fragmenting the uniform standard for defamation arising out of a labor dispute. A union can be held liable for actual damages resulting from defamatory utterances during the course of a labor dispute in one state which only requires reputational harm, but would escape liability for uttering the identical statements with identical damage to reputation in another state such as Pennsylvania. Such a result is hardly one designed to persuade unions to adopt procedures calculated to prevent "the malicious utterance of defamatory statements in any form" as *Linn* recommended.

B. The Wide Disparity Among the States on the Requirement of Pecuniary or Other Special Damages for Slander *Per Quod* Imperils the Congressional Mandate of a Uniform National Labor Policy and Demonstrates the Absence of a Compelling State Interest in Doing So in Labor Dispute Defamation

In *Plumbers Union v. Borden*, 373 U.S. 690, 693-694 (1963), this Court stated that when there is a conflict between the federal interest in establishing and maintaining a national labor policy and a state interest, the courts must essentially weigh the competing interests. The state interest can prevail only if it is a compelling or "overriding"one and the effect on a national labor policy is a "peripheral" one. This Court has already decided in *Linn* that the federal interest in a uniform labor law overrides state interests in setting forth varying *substantive* standards for recovery of defama-

tion damages that arose out of a labor dispute. This Court also set forth the remedies available:

> [G]eneral injury to reputation, consequent mental suffering, alienation of associations, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law.

Linn, 383 U.S. at 65.

Hence, the question now before the Court is whether the states can prevent a plaintiff defamed with actual malice during a labor dispute, who suffered actual damages, from recovering those actual damages by making archaic distinctions between defamation *per se* and *per quod* and preventing recovery of actual damage, in the latter case, unless the plaintiff has also suffered pecuniary or other special damages. Such relics of the common law of defamation essentially allow the states to add requirements beyond those set by *Linn* and to impose different standards on defamation arising during a labor dispute.

Many states have recognized that the *per se/per quod* distinctions are without validity in the era of constitutional defamation law, and no longer use those distinctions as a means of allocating a plaintiff's burden of proof.[8] Other states have explicitly eliminated the distinctions in libel, but have either left the old rules

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[8] *See Gobin v. Globe Publishing Co.* ("Gobin III"), 649 P.2d 1239, 1242 (Kan. 1982); *United Insurance of America v. Murphy*, 961 S.W.2d 752 (Ark. 1998); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993); *Shuler v. The McGraw Hill Company, Inc.*, 989 F. Supp. 1377 (D. N.M. 1977) *aff'd*, 145 F.3d 1346 (10th Cir. 1998), *and cert. denied*, — U.S. — ,119 S.Ct. 548, 142 L.Ed.2d 456 (1998) (applying New Mexico law); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (libel); *Pate v. Service Merchandise Company, Inc.*, 959 S.W.2d 569 (Tenn. App. 1996) (slander).

regarding slander and special damages intact or have not addressed the issue directly in the slander arena.[9] Yet a third group of states still utilizes the distinctions, but appear to have dropped the special damages requirement for *per quod* cases in favor of an actual damages requirement consistent with *Gertz*.[10] In a number of other states, "actual" damages and "special" damages are not clearly defined, or are used interchangeably, making it difficult to determine what the damages pleading and proof requirements in those states really are.[11]

Linn recognized the states' overriding interest in protecting their residents from malicious libel. To that end, it imposed actual malice and actual harm requirements even in *per se* defamation cases. Petitioners submit that the states which still enforce the *per se/per quod* distinctions have articulated no additional overriding interest which would justify individual exceptions to a uniform, national labor policy.

This Court should grant the Petition and hold that the states may not utilize outmoded *per se/per quod* analyses of defamation occurring during a labor dispute to impose additional burdens of

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[9]*See Spence v. Funk*, 396 A.2d 967, 971 (Del. 1978); *Mid-Florida Television Corp. v. Boyles*, 467 So.2d 282 (Fla. 1985); *Lakian v. Globe Newspaper Co.*, 504 N.E.2d 1046 (Mass. 1987); *Holland v. Kennedy*, 548 So.2d 982 (Miss. 1989); *Matherson v. Marchello*, 473 N.Y.S.2d 998 (N.Y. App. Div. 1984); *Hinkle v. Alexander*, 417 P.2d 586 (Ore. 1966); *Holtzschleiter v. Thomson Newspapers*, 506 S.E.2d 497 (S.C. 1998); *Lent v. Huntoon*, 470 A.2d 1162 (Vt. 1983); *Bauer v. Murphy*, 530 N.W.2d 1 (Wis. App.), *rev. denied*, 537 N.W.2d 570 (Wis. 1995); *Agriss v. Roadway Express, Inc.*, 48 A.2d 456 (Pa. Super. 1984).

[10]Those States include California (slander), Colorado, Iowa, Louisiana, Maryland, Minnesota and North Dakota (libel).

[11]Those States include Alaska, Connecticut, Montana, New Hampshire, Ohio, Oklahoma, South Dakota and Virginia.

proving special damages. Otherwise, there will be no uniform national standard for defamation arising in labor disputes.

CONCLUSION

For the foregoing reasons, Petitioners Beverly Enterprises, Inc. and Donald L. Dotson respectfully request that the Writ of Certiorari be granted.

Respectfully submitted,

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